"PROPORTIONALITY" UNDER THE FEDERAL RULES: AN OVERVIEW

By

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<u>INTRODUCTION</u>. The concept of proportionality underlies the Federal Rules of Civil Procedure ("Rules"). Proportionality may be explicit in some of the Rules, but is implied throughout. Proportionality addresses litigation conduct, including making and responding to discovery requests, ethical behavior, and the award of sanctions. This short paper will look at the Rules.

<u>RULE 1</u>. Rule 1 provides that the Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." The words, "and administered," were added in 1993. The revision was intended to, "recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. *As officers of the court, attorneys share this responsibility with the judge to whom the case is*

***assigned*.” *Advisory Committee Note to 1993 Amendment to Rule 1* (emphasis added). Rule 1 thus imposes an obligation on the Bench and the Bar to take affirmative steps to resolve litigation in a “proportional” manner, taking into consideration fairness and costs.**

<u>RULE 26(b)(1)</u>. This Rule establishes the scope of discovery in federal civil litigation. In a sense, it bifurcates discovery. First, “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Second, for good cause shown, “the court may order discovery of any matter relevant to the subject matter involved in the action.” That bifurcation is an invitation to courts and attorneys to strive for proportionality in discovery by limiting the subjects of discovery. However, under either standard, Rule 26(b)(1) explicitly recognizes proportionality: “All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).” Rule 26(b)(2)(C) is the “proportionality rule.”

<u>RULE 26(b)(2)(B)</u>. This Rule, adopted as part of the electronic discovery amendments in 2006, again makes explicit reference to the proportionality rule. Rule 26(b)(2)(B), building on the *Zubulake* decisions, established the concept of ”not reasonably accessible” sources of electronically stored

information or "ESI." In the first instance, discovery may not be had from sources of ESI that are not reasonably accessible "because of undue burden or cost." However, assuming that undue burden or cost is shown, "the court may nevertheless order discovery from such sources if the requesting party shows good cause, *considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery."* (emphasis added).

Again, proportionality operates on several levels in this Rule. First, considerations of cost and delay make certain sources of ESI presumptively not subject to discovery, thus conserving party resources. Second, if a court finds good cause to allow discovery from such sources, the court looks to the proportionality rule to determine what discovery should be had and under what conditions.

<u>RULE 26(b)(2)(C)</u>. This is the proportionality rule. Unfortunately, as has been observed on more than one occasion, it may be the *most* underutilized of the Rules: "The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated." *GAP Report to 2000 Amendment to Rule 26(b)(1).* Presumably, as the Bench and the Bar confronts issues of, among other things, the volume and complexity of

electronic discovery, the Rule will be featured more often in arguments and rulings.

Rule 26(b)(2)(C) provides that, on a party's motion or *on its own initiative,* "the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines" that one or more of three conditions are met. These conditions are:

"the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." Rule 26(b)(2)(C)(i).

"the party seeking discovery has had ample opportunity to obtain the information by discovery in the action." Rule 26(b)(2)(C)(ii).

"the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the party's resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Rule 26(b)(2)(C)(iii).

Each of these conditions calls for some analysis of proportionality.

Rule 26(c). Rule 26(c) addresses protective orders. Again, in a sense, it addresses proportionality at several levels. First, the Rule provides that no motion may be made unless the moving party certifies that it has "in good faith conferred or attempted to confer with other affected parties to resolve the dispute without court action." Rule 26(c) thus attempts to conserve the resources of the parties and the courts and further the goals of Rule 1.

Assuming a motion is made, Rule 26(c) provides that, "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Among other things, Rule 26(c) orders may, for example, bar Rule 26(a)(1) disclosures or discovery, specify the time and place of discovery, and forbid discovery into certain matters. Rule 26(c) thus affords considerable discretion to judges to, in effect, impose proportionality on parties.

Rule 26(g). Rule 26(g) is the discovery counterpart of Rule 11, both of which address the effect of attorneys' signatures. Rule 26(g)(1) provides that every disclosure, "and every discovery request, response, or objection must be signed by at least one attorney of record… ." Moreover, "[b]y signing, an attorney … certifies that to the best of the person's

knowledge, information, and belief formed after a reasonable inquiry" certain implied representations are correct. One of these representations is that discovery requests, responses, or objections are "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action." Rule 26(g)(B)(iii).

The 1983 Advisory Committee Note explains the purpose of this Rule. It "imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37." Moreover, Rule 26(g) "is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions." It provides "a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection." ***Advisory Committee Note to 1983 Amendment to Rule 26(g).***

As with the Rules described here, Rule 26(g) addresses proportionality on several levels. First, it is self-executing: it requires an attorney to "stop and think" before engaging in an act related to discovery and affixing his signature to a document. Second, it empowers courts to address whether

discovery requests, responses, or objections are intended to increase cost and delay or are unreasonably burdensome or expensive, taking into account factors similar to those described in the proportionality rule. *Mancia* v. Mayflower*Textile Servs. Co.,* 253 F.R.D. 354 (D. Md. 2008), demonstrates the potential utility of Rule 26(g) to achieve proportionality.

Conclusion. The Rules encourage proportionality considerations by both the Bench and the Bar. How these considerations are applied in practice will be considered at this program.

(For a broader discussion of proportionality in civil litigation, *see The Sedona Conference® Commentary on Proportionality in Electronic Discovery,* available at www.thesedonaconference.org)

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